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Br. of Douglass for Appellees.

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THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

COLUMBUS J. ESLIN, ADMR., ETC., ET AL.

[Appeal from the Court of Claims.]

BRIEF FOR APPELLEES

In Case No. 280. Executors of Osceola C. Green, Surviving Partner, Etc.

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STATEMENT.

Daniel Connolly, on the 1st of December, 1874, entered into a contract with Downman & Green, by which the latter were to receive from the District all bonds or certificates, and to receipt for money due to Connolly "for work done or to be done, under contracts No. 243 and 1028." The consideration for this, as expressed in the agreement, was the moneys advanced by the claimants to Connolly (Rec., p. 4, 51).

Immediately following this agreement and in pursuance of it, Connolly gave to the claimants a power of attorney (Rec., pp. 4, 42, 43 and 44), which was duly filed of record in the office of the District Commissioners (see Rec., p.), which authorized the claimants in Connolly's—

> "name, place and stead, to demand, ask, sue for, collect and receive all sums of money, bonds, or any other claims whatsoever which are due, owing, or payable to me from the District of Columbia, . . . arising from and done [or], to be done, on Massachusetts avenue, under contract No. 243," etc.

> "Of all the powers and assignments hereinbefore set forth the defendants had due notice" (Rec., p. 46).

That the sum of $1,250.76 is due the claimants in No. 280, and for which amount judgment was entered in the Court of Claims June 22, 1896 (Rec., p. 48 and 49), due and payable February 1, 1876 (Rec., p. 66).

Downman & Green furnished the money to carry on contracts 243 and 1028, and their advances to carry on the work amounted in February, 1876, to $58,000. This exceeded their receipts in the sum of $8,700.

On the 19th of October, 1895, on motion suggesting the death of Osceola C. Green, surviving partner of Downman & Green, No. 280, D. C., it was ordered that the suit be revived in the names of his executors, William A. Gordon and J. Holdsworth Gordon.

The statement has been curtailed so as to avoid reiteration; reliance has been placed in the argument upon the page references to the record.

ARGUMENT.

I.

The Attorney General contends that the over-payments to Connolly on contracts in which Downman & Green never had any interest or control, being contracts Nos. 595, 1057, 665, and 690 (Rec., p. 20) should be offset against the balances found due to Downman & Green under contracts No. 249 and 1028. This the Court of Claims refused in the most positive terms (Rec., p. 47), and we contend in exact accordance with the authorities.

> "A counterclaim is a cause of action against the plaintiff, and, unless the facts, if alleged in a separate action against the plaintiff, make out a cause of

action against him, they do not constitute a counterclaim."

Waite's Actions and Defs., Vol. 7, page 542, and cases cited.

Suppose, on this principle, the District had sued Downman & Green and alleged the overpayments on contracts 447, 527 and 693, as the cause of action, could a judgment have been obtained by the district when the evidence all showed that they (Downman & Green) had never had a dollar under those contracts; but that all their receipts had been for money under other contracts, and for work on other streets? That is exactly the position of the parties and facts here, and gives us, we contend, the right to the moneys due under 243 and 1028, without the offsets as attempted.

Again:

"The application of this rule is most frequently made in actions brought by assignees of the demands in suit; and if the plaintiff be such an assignee, no demand accruing to the defendant against the assignor can be enforced as a counterclaim."

Waite's A. & D. Vol. 7, page 542, and cases cited.

This rule illustrates the present case exactly. Downman & Green bring their action as "*assignees*" of the demand in their suit. The demand of the defendant accrued against Connolly, the "*assignor*" and therefore can not, under the principle last cited, "be enforced as a counterclaim against the assignees," Downman & Green.

There is another well settled rule of the courts that prevents the District from touching the proceeds found by the referee under contracts Nos. 243 and 1028.

As between Downman & Green and the District, they are, in this proceeding, both creditors of Connolly, claiming respectively certain sums due under contracts 243 and 1028, with Connolly also claiming the sums due under *eight other* contracts, Nos. 209, 231, 349, 595, 1057½, 665, 690 and 828. The rule referred to is this:

> "It may be laid down as the general rule, . . . that if a creditor has two funds, he shall take his satisfaction (if he may) out of that fund upon which another creditor has no lien."
>
> Waite's A. & D. Vol. 1, page 571, and cases cited.

This principle will prevent the District from taking her counterclaim out of the proceeds from 243 or 1028, for she has the whole of the eight other contracts to counterclaim on, and from which Downman & Green are altogether excluded, When the additional fact is considered, as shown by the record, that Connolly had as early as 1874 assigned all his interests in payments under contracts 243 and part, at least, of 1028, and the defendant duly notified, the argument in favor of Downman & Green becomes, we submit and earnestly contend, impregnable (Rec., pp. 20, 42, 43 and 51).

II.

In Finding No. 15 the Court of Claims expressly find:

> "That Downman & Green furnished the money to carry on contracts 243 and 1028 . . . and that their advances, in February, 1876 ($58,000), exceeded receipts in the sum of $8,700" (Rec., p. 44).

The agreement and power of attorney from Connolly to Downman & Green (Rec., pp. 42, 43 and 44) constitute a full and complete legal assignment, especially authorizing Downman & Green "to demand, ask, sue for, collect, and receive all sums of money, bonds," etc., "due or owing or payable to Connolly from the District of Columbia" (Rec., p. 42); and yet the Attorney General in his Brief, page 19, asks, "Do these instruments consitute an equitable assignment," etc.? The court below found (Rec., p. 46) that the appellant had "due notice of all the powers and assignments." Under these circumstances of notice if the District *had* paid to Connolly under contract 243 or 1028, which they did not, the appellant could not successfully defend by pleading its own wrong.

The reference at the foot of page 19 of the appellant's Brief is equally unfortunate, for the whole account when balanced, shows the District to be indebted under contract 243 to the amount of $9,529.95: and the court found (Rec., p. 44) that the final balance after a full accounting under both contracts (243 and 1028) was, in 1876, $8,700.

The rights of Downman & Green are clearly well founded, both legally and equitably.

The appellant, on page 18 of the brief, attempts to contradict the finding of the court below, where they found that "Downman & Green furnished the money to carry on contract 243 and 1028." This of course will not be considered seriously by this court. The appellant should have moved for an amendment of the finding in the court below; not having done so, the finding stands here for an absolute verity and unimpeached.

III.

One other point contended for remains to be considered—that of the allowance of "board rates." The appellant contends (Brief, p. 21) that "these allowances were illegal." Were they?

The contracts originally made with Connolly were at certain uniform rates. Subsequently, September 27, 1873, the municipal authorities increased the rates (Rec., p. 29).

This increase of rates grew out of the acknowledged fact that soon after the original contracts were made the price of all kinds of labor required under them went up by the increased demand in the District, and the contractors were obliged to pay more than they had anticipated. To cure this trouble there were but two ways: (1) to throw up the contracts; (2) or to ask the municipality for a proportionate increase of compensation. To have taken the first course would have been to leave the city and District torn to pieces as to its streets for months and possibly years. The second and wiser course was taken; and a fair adjustment made by a slight increase in compensation.

The following extract from a brief of the late Judge Shellabarger succinctly puts the legal view of the case on this question of the appellees:

> "Coming back now to the authorities upon the question of the power of a municipal government, like that administered by these Commissioners under the act of 1874, we call the attention of the court to the case of Meech *vs.* City of Buffalo, 29 N. Y. 198."

In this case the law on this point is laid down in the syllabus in this language:

> "A municipal corporation, having power to make a public improvement, and incidentally the power to contract for doing the work, may *voluntarily* increase the contract price where the circumstances will equitably justify it, unless prohibited by its charter from doing so."

That doctrine is thoroughly discussed in the opinion of Judge Wright, and a concurring opinion by Judge Johnson, and a further concurring opinion by Judge Mullen, all the judges concurring.

It was a proceeding on the part of Meech against the city to *enjoin* the city of Buffalo from collecting a *second* assessment on his property to pay an *additional* sum to a contractor beyond his contract price, and the court declined to enjoin the city, and fully sustained the right of the municipality to voluntarily increase the contract price as stated in the syllabus.

The same doctrine regarding the flexibility of municipal officer's powers to do justice is laid down in—

Bean *vs.* Jay, 23 Me. 117.
Baileyville *vs.* Lowell, 20 Me. 178.
Nelson *vs.* Milford, 7 Pick. 18.

And by Judge Dillon in his work on Municipal Corporations, section 398, in the following language:

> "If [referring to a municipal corporation] it has obtained the contract which, by mistake or a change

> of circumstances, it deems to operate oppressively upon the other party, an agreement to make an additional compensation or to modify or annul it, is not invalid for want of consideration."

In the foregoing we have referred particularly to the fact that the District Commissioners were not circumscribed in their power of contracting. This is equally true with the Board of Public Works. That board had the right to contract, and the act of June 20, 1874 (78 Stat. 119) expressly validated all its contracts, written and oral, by auditing claims founded thereon, and paying them.

IV.

On page 21 of the appellant's brief it is contended that the prerogatives and exemptions of sovereignty protect the municipality from the rule that mistakes of law can not be corrected. This, in regard to the payment or allowances of board rates under the original act of June 16, 1880. The brief uses the word "government" as descriptive of the District.

This court in the case of the Met. RR. Co. vs. The District of Columbia, U. S. Reports, 135, p. 1, held exactly the contrary of the appellant's contention on a parallel point There it was contended for the District that it was not bound by the Statute of Limitations on account of the prerogative and exemption of sovereignty, which is based on the same reasoning that exempts a sovereignty, State or National, from the plea of "mistake of law." Judge Bradley, delivering the opinion of the court, said:

> "We are clearly of opinion that the plaintiff is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between individuals."

Here we claim that if "board rates" were paid in "mistake of law," under the above ruling they can not be counterclaimed any more than if the question was one between individuals.

V.

By the repeal of the act of 1895, this case is to be determined (debt and interest) under the act of June 16, 1880, commonly called the "Original Act."

The 6th section of the act of 1880 provided that the judgments should be paid out of certain bonds, and then added this proviso:

> "That before the delivery of such bonds as are issued in payment of judgments rendered on the claims aforesaid, the coupons shall be detached therefrom from the date of the bonds to the day upon which such claims were due and payable," etc.

Under this proviso the Court of Claims always had to find that date, so that the Secretary of the Treasury could calculate the interest by cutting off the coupons that represented the time between the date of the bonds and the date the claim was found to have been "due and payable." Under the act of 1880, between 30 and 40 judgments were paid with interest as aforesaid, and there was no dispute about it. In these cases the court found that the interest was "due and payable, February 1, 1876" (Rec., p. 66). The claim in this case then is for $1,250.76, with 3.65 interest from February 1, 1876 (Rec., p. 66).

It may not be out of place to say in conclusion that the men who put their capital, labor and time into the work that has made the city of Washington the delight of the visitor and resident, famous for its streets, parkings and shade, should at least be remunerated for actual expenditures at the then current rates of labor and material.

It would seem a pity to mar this splendid record of effort and result by a conclusion of injustice to anyone concerned in its execution.

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